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No. 84-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OPPENHEIMER & CO., INC.,
Appellant,

v.

MARCIA A. YOUNG,
Appellee.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee, Marcia Young, respectfully moves to dismiss for want of jurisdiction, or affirm the judgment of the Supreme Court of Florida in this case on the ground that the judgment is correct.

STATEMENT OF THE CASE

In 1981, Marcia Young ("Young") sued Oppenheimer & Co., Inc. ("Oppenheimer") and others in federal court in the Southern District of Florida. She alleged that the defendants' scheme to induce her to commit her entire net worth to leveraged purchases of junk bonds—which investments were wholly inappropriate for Young, a 70-year old widow—violated the federal and Florida securities laws. The district court dismissed the state claims for lack of pendent jurisdiction.

Young re-filed her state claims in state court. Of the three defendant brokerage houses, Oppenheimer alone moved to enforce a clause in the brokerage contract, which stated, "Any difference between us with respect to my account or any transaction shall be submitted to arbitration in New York City. . . ." The trial court ordered arbitration.[1]

The Third District Court of Appeal quashed the trial court's order [App. B], and the Florida Supreme Court approved that decision. [App. A]

The Florida courts reasoned that the pre-sale arbitration contract was an impermissible waiver of the statutory right to a judicial determination of claims based on securities transactions in interstate commerce. As such, the arbitration contract was unenforceable under the Federal Arbitration Act, pursuant to *Wilko* v. *Swan,* 346 U.S. 427 (1953). The courts also held that, since Florida law extends the same civil remedies to purchasers and sellers of securities in interstate commerce as the laws of the United States, *Fla. Stat.* § 517.241(3) (1981), an arbitration agreement which is unenforceable under United States law is also unenforceable in Florida.

MOTION TO DISMISS

Young respectfully moves to dismiss the appeal for want of jurisdiction.

The Jurisdictional Statement presents the question whether "a provision of the Florida Securities Act"

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[1] The claims against the remaining defendants are pending in state court.

is invalid under the Supremacy Clause as being in conflict with the Federal Arbitration Act, 9 U.S.C.S. § 1-3 (1978) ("FAA").

A review of the relevant statutory provisions, however, shows that the Florida Securities Act, on its face, does not conflict with the FAA. *Compare* App. E.2. *with* App.E.4. Therefore, there can be no claim that the statute is invalid on its face.

In reality, Appellant's challenge goes to the state court's interpretation of *Wilko* v. *Swan,* 346 U.S. 427 (1953). In a broader sense, it is a challenge to the construction of the Florida Securities Act as incorporating the federal right to judicial determination of disputes arising from securities transactions in interstate commerce. Appellant also questions the state court's construction of the FAA. But none of Appellant's challenges involve "the validity of a statute of any state" as required for an appeal under 28 U.S.C.S. § 1257(2) (1977). Appeal jurisdiction therefore does not lie.

MOTION TO AFFIRM

Alternatively, Young respectfully moves to affirm the judgment on the ground that it correctly construes and applies federal law, thereby leaving no substantial question for argument.

1. The Decision Below Follows Congressional Mandate and Policy.

The federal securities laws seek "to protect interstate commerce" and "to insure the maintenance of fair and honest markets." 15 U.S.C.S. § 78b (1983). Congress has declared that regulation is necessary be-

cause securities transactions in exchanges and over-the-counter markets "are affected with a national public interest" involving interstate commerce, the national credit, the federal taxing power, the national banking system, and the Federal Reserve System. *Id.*

In enacting the federal securities laws, Congress expressly allowed the States to regulate the same transactions that are the object and concern of the federal laws—that is, purchases and sales of securities in interstate commerce. *See* Section 18 of the Securities Act of 1933, 15 U.S.C.S. § 77r (1975); Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C.S. § 78bb(a) (1983).

Congress also specifically provided that "there should be greater Federal and State cooperation" and "greater uniformity in Federal-State securities matters" so as to achieve "maximum effectiveness of regulation." Section 19 of the Securities Act of 1933, 15 U.S.C.S. § 77s(c) (Supp. 1984).

The Florida Legislature evinced a reciprocal intent when it enacted the Florida Securities Act. In this case, the Florida Supreme Court construed that law as follows:

> . . . [I]t was the intent of the legislature, in enacting the Florida Securities Act, to rely on federal laws and enforcement efforts in the securities field and to cooperate with those efforts in formulating Florida law.
>
> * * *
>
> The Florida Legislature reacted almost immediately to the entry of the federal government into the securities field by enacting chapter 16174, Laws of Florida (1933). * * * Section 4 provided not only for cooperation with federal authorities

> regulating securities transactions but, to the degree possible under state law, provided for the actual application of federal laws and regulations to the sale of securities intrastate. Section 5 granted to purchasers of securities the same civil remedies provided by laws of the United States for purchasers of securities under such federal laws. Section 6 granted jurisdiction to the courts of this state to hear civil suits concerning securities violations of federal laws to the degree the courts had jurisdiction to hear civil suits concerning securities violations of the laws of Florida. *It is clear from the above that the legislature intended that Florida securities laws be hand-in-glove with federal securities laws and that Florida purchasers of securities be granted the full range of civil remedies offered by both Florida and federal securities laws.*

App. 2a-4a (emphasis added).

This Court in *Wilko* v. *Swan,* 346 U.S. 457 (1953), construed the Securities Act of 1933 to prohibit a pre-sale waiver of the right to sue in courts. The Court decided the issues based upon the broad purposes and policies of the securities laws:

> *When the security buyer,* prior to any violation of the Securities Act, *waives his right to sue in courts, he gives up more than would a participant in other business transactions.* The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.
>
> *Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings . . . * * * As*

> *the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 [the non-waiver provision], . . . to apply to waiver of judicial trial and review.*
>
> * * *
>
> We decide that *the intention of Congress* concerning the sale of securities *is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.*

346 U.S. at 435-38 (emphasis and brackets added).

Wilko's rationale has been equally applicable to securities claims under the Securities Exchange Act of 1934. The right to judicial remedies is so significant for the accomplishment of Congressional objectives that the Securities and Exchange Commission has promulgated a rule regulating the use of arbitration clauses within its jurisdiction. Rule 15c2-2, adopted in Exchange Act Release No. 20397, 48 Fed. Reg. 53404 (1983).[2]

Pursuant to Florida law, the Florida Supreme Court followed *Wilko*. The court held that the arbitration contract was unenforceable to resolve disputes con-

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[2] Had Congress wished to disapprove the *Wilko* exception to arbitration, it could have done so by expressly sanctioning arbitration of disputes between public customers and brokers. *Compare* Section 28 of Securities Exchange Act of 1934, 15 U.S.C.S. § 78bb(b) (1983) (expressly approving arbitration in the securities field for members of self-regulatory organizations). Congressional silence in this regard signifies implicit approval of *Wilko* to this day. There is no reason to doubt that *Wilko* continues to reflect Congressional policy concerning the right to judicial remedies for violations of the federal securities laws.

cerning securities transactions in interstate commerce. This application of *Wilko* is correct. It conforms to federal law because the "national public interest" behind the federal securities laws is implicated and involved in this dispute, which arises from securities transactions in a national exchange. In view of this common federal-state interest, there is no principled reason to deny an aggrieved purchaser of securities in interstate commerce a "legally correct adjustment" of her claims, *Wilko,* 346 U.S. at 438, merely because she chose to claim under state law. The Florida Supreme Court properly applied *Wilko* in this case.

2. The Decision Below Does Not Conflict With *Southland.*

In *Southland Corp.* v. *Keating,* 104 S.Ct. 852 (1984), this Court invalidated a provision of the California Franchise Investment Law barring arbitration of claims under that law. The California Legislature had attempted to create an exception to the FAA: the arbitration contracts affected by the California law were otherwise enforceable under federal law. The only federal interest in *Southland* was the policy favoring arbitration.

Southland clearly did not compel a different result here. The arbitration contract involved in this case was not enforceable under federal law. The Florida Supreme Court created no exception to the FAA; it merely construed the FAA as interpreted and applied under federal law.[3]

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[3] Florida courts duly follow the FAA and enforce arbitration agreements within the coverage of the Act, as required by this Court's decision in Moses H. Cone Memorial Hospital v. Mercury

Moreover, the presence of a scheme of cooperative federalism introduces concerns in this case that were absent from *Southland*. In this case, the Florida court gave effect to federal law and policy in a field of interstate commerce involving comprehensive regulation from the federal to the state level, with a declared federal goal of uniformity and cooperation between the two.

Florida has adopted federal measures that support the protective provisions of the securities laws. One such measure is the statutory right to sue in courts, guaranteed under federal law to victims of fraudulent security transactions in interstate commerce. Florida's adoption of federal law in this respect is completely in conformity with the regulatory scheme.

It would be incongruous for the federal government to expect the States to cooperate in the protection of interstate commerce, the national credit, and banks—in short, to protect the backbone of the nation—and at the same time to quash a State's efforts toward that very end. Indeed, it would be a travesty of logic and of federalism to deny a State the right to embrace and follow federal law in the pursuit of common goals by the State and by the nation.

The Florida Supreme Court considered and weighed these concerns and correctly decided that its decision did not violate United States law. App. 7a.

Construction Corp., 103 S.Ct. 927, 941 (1983). *See, e.g.*, the opinion of the Third District Court of Appeal in this case: "[T]he Federal Arbitration Act applies to compel arbitration of claims filed in state courts based on agreements which affect interstate commerce *other than those involving sales of securities.*" [App. 7b; emphasis in text]

3. The Decision Below Is Also Correct For Practical Reasons.

This case does not remotely involve "ancient prejudices against arbitration." Those prejudices ceased to exist in Florida almost thirty years ago, when the Florida Legislature enacted the Florida Arbitration Code, Chapter 57-402, Laws of Florida (1957). Florida clearly shares our national policy favoring arbitration.

But there is also a national policy which prevails over that favoring arbitration—the policy of protecting investors in the interstate securities markets. That hierarchy of policies has been the law in the United States since this Court decided *Wilko*.[4]

Federal law compels, not the validity—as Oppenheimer claims—but the invalidity of arbitration agreements between brokers and public customers like Mrs. Young. This federal law ought to be uniformly applied and interpreted so as to further the intent and purpose of securities regulation.

Lack of uniformity, as urged by Oppenheimer, may arguably serve to benefit private interests, but not public customers. For example, the practical result of a rule that state claims may be arbitrated would be to require aggrieved investors to prosecute their

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[4] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), does not modify this rule. In that case, this Court held that an arbitration agreement was enforceable to compel arbitration of federal securities claims. But the contract was not between a broker and a customer, but between parties to an international contract for the sale of three business entities. Considering foreign trade policy, and the uncertainty that could result from international conflicts of laws if parties could not select in advance a dispute resolution forum, the Court held that the dispute should be arbitrated.

claims in two separate forums, if they wish to claim under both federal and state laws. The end result would therefore be the duplication in total number of proceedings, rather than the lessening or relieving of court dockets.

In summary, the Florida Supreme Court's decision holding the arbitration contract unenforceable is not only valid, but it is also sound. It should be affirmed.

CONCLUSION

For the reasons stated herein, Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Florida Supreme Court.

Respectfully submitted,

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